

**A STUDY OF THE REFUGEE DEFINITION AND THE
EFFECTIVENESS OF UNHCR IN PROTECTING AND
PROMOTING THE RIGHTS OF REFUGEES.**

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BY

LIYA BANDA

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EFFECTIVENESS OF UNHCR IN PROTECTING AND
PROMOTING THE RIGHTS OF REFUGEES.**

BY

LIYA BANDA

**Being a paper submitted in partial fulfillment of the examination requirements for
the degree of Bachelor of Laws of the University of Zambia.**

SEPTEMBER, 2002

THE UNIVERSITY OF ZAMBIA
SCHOOL OF LAW

I RECOMMEND THAT THIS DIRECTED RESEARCH UNDER MY
SUPERVISION

BY

LIYA BANDA

ENTITLED

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EFFECIVENESS OF UNHCR IN PROTECTING AND PROMOTING
THE RIGHTS OF REFUGEES”**

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DEDICATION

**To dad: thank you for always believing in me, you are my inspiration.
To mum: thank you for your love and prayers, you are my role model.
My precious brothers: thank you for your encouragement and advice
which came just at the right times. Guys you are great I couldn't have
done it without you!**

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INTRODUCTION

Historically, refugees were associated mainly with the flight of East Europeans to the West. This was due to the changes that occurred in the political and social structure in Europe. At the close of the First World War, there was a major breakdown of the 'centuries-old' Russian and Turkish empires, which resulted in mass exodus of persons who were refugees from the new regimes.¹ These refugees were mostly Russians and Armenians, whose total figure amounted to approximately a million persons. Other events which contributed to the view that refugees were mostly from Eastern Europe were the establishment of the Fascist regime in Italy, which led to the creation of tens of thousands Italian refugees; the Spanish Civil war which added to the number of refugees by the hundred thousands and the unforgettable creation of the Nazi regime in Germany and the occupation by Nazi Germany of other regions such as the Saar, Austria, Sudetenland and Protectorate which resulted in a new wave of refugees.²

The end of the Vietnam war and the mass exodus of Southeast Asian refugees have changed the view that refugees are mainly from Eastern Europe. With events such as the refugee in-pouring to Somalia, the mass exodus from Afghanistan to neighboring Iran and Pakistan and the flight of Ethiopian refugees and drought displacees, governments, voluntary agencies and the general public have been sensitized to the plight and status of refugees in third world countries. The 1990's have literally witnessed a series of civil wars and communal conflicts in which masses of people have been forced to flee for their lives. This was namely in Burundi, Chechnya, Colombia, Liberia, Rwanda and Sri Lanka. While on the other hand in places such as the former Yugoslavia, Caucasus and the Great Lakes Region of Africa millions of women, men and children have been deliberately forced to abandon their homes merely so that their land and property could be occupied by others.³

¹ Robinson, Nehemiah, **Convention Relating to the Status of Refugees**. Institute of Jewish Affairs World Jewish Congress. 1997. P.1.

² Ibid.

³ UNHCR., **The State of the World's Refugees. A Humanitarian Agenda**. Oxford University Press: Oxford. P.X. 1997-98.

Although currently Africa has had the largest number of refugees recorded, it is a worldwide problem. According to Kliot, N (1987), “more than 100 million people have become refugees since the beginning of the [previous] century as a result of wars, revolutions and boundary changes.”⁴

Indeed, the plight of refugees has affected many different nations to a great extent. Some nations are affected in that due to happenings within their boundaries people have been forced to flee to neighboring countries to find safe havens. It is common knowledge that for many people whose lives and liberty are threatened in confrontation, the solution has been to flee to another country in order to find safety. In 1970 there were 2.5 million refugees in the world. Ten years ago there were 11 million refugees. In 1993, the number was 18.2 million⁵. In 1997 over 13 million people found themselves fitting in the category of people fleeing their countries to find safety elsewhere. A vast majority of this number came from and lived in the world’s poorer countries.

On the other hand, nations that accommodate refugees within their boundaries are also affected greatly by the plight of refugees. As a consequence, an increasing number of countries are closing their borders to the growing number of refugee influxes. It is therefore, becoming more and more difficult for refugees to find a place of safety beyond the borders of their homeland.

In order to provide protection and assistance to the world’s growing number of refugees, the United Nations High Commissioner for Refugees (UNHCR) was established. The organization was created by the United Nations General Assembly in 1951. It was given a specific mandate, which mandate does not seem to be sufficient at present to deal with specific refugee issues. The problem is that it is becoming more and more difficult to differentiate clearly between bona fide refugees or asylum seekers and economic

⁴ Kliot, N. **The Era of the Homeless Man**. Geography Journal Vol.72. 1987. p.1.

⁵ UNHCR. **The State of the World’s Refugees: The Challenge of Protection**. UN: Penguin Books. 1993. p.5.

motivated migrants who use the umbrella of the refugee status to emigrate to areas of better economic opportunities.

The nature of the refugee problem has undergone fundamental changes, which call urgently for new approaches. It has therefore become necessary to reconsider the definition of a refugee due to new factors that are emerging and are causing people to flee their own countries to find solace elsewhere. Once the refugee definition is reconsidered it only becomes inevitable to consider whether UNHCR is effective in fulfilling its mandate of protecting and assisting the refugee.

In Chapter one several definitions of the ‘refugee’ concept will be examined. The aim is to consider how different regions and instruments view refugees. Chapter two will be centered on the rights and obligations that emanate from the different refugee definitions. Special emphasis will be given to HIV/AIDS victims. This is in order to examine whether the victims are treated as equals with other refugees or asylum seekers or whether they are discriminated against on the basis of being infected. It is important to examine what effect the pandemic has had on the observance, promotion and protection of the rights of refugees. Following this will be a discussion concerning UNHCR in Chapter 3 with a look at its origin and mandate in protecting refugees. Thereafter, in Chapter 4 there will be a critical analysis of the effectiveness of UNHCR in fulfilling its mandate by studying one case, that of Zambia. Finally, the conclusion and recommendations will be dealt with in Chapter 5.

CHAPTER ONE

RECONSIDERING THE REFUGEE DEFINITION

INTRODUCTION

The protection that the international community extends to refugees is dependent on the specific needs of people who have valid reasons to fear that their own governments will not or cannot provide safeguards against their abuse. Therefore, this protection will only be extended to those individuals or groups of people who are recognized as being genuine refugees. It has been stated that although it is difficult, if not impossible, to arrive at a rigid and generally acceptable definition of the term 'refugee', it is important to define the term for a number of reasons. Firstly, defining it helps in reviewing the refugee situations. Secondly, it is necessary in order to determine the rights and obligations, and the availability of solutions to the refugee problem.⁶ Several definitions will be considered, therefore, in order to examine the concept of a 'refugee'.

1.1 GENERAL DEFINITION

It can be grasped from international treaties, resolutions and declarations that refugees are basically people who are outside their countries because of a well-founded fear of persecution there based on their race, religion, nationality, political opinion or membership in a particular social group and who cannot or do not want to return home.⁷

Generally, a refugee in everyday speech is a person who is forced to flee his or her home for any reason for which the individual is not responsible, whether it is persecution,

⁶ Kourula, Pirkko, **Refugees and Human Rights. Broadening the Edges. Refugee Definition and International Protection.** Martinus Nijhoff Publishers: The Hague/Boston/London. 1997. P.43.

⁷ UNHCR, **Helping Refugees. An Introduction to UNHCR.** Lemoine: UNHCR Public Information Section. 1998.

public disorder, civil war, famine, earthquake or environmental degradation.⁸ This is the definition that the media, politicians and the general public use to describe anyone who has been obliged to abandon his or her usual place of residence and is quite inadequate. Its inadequacy stems from the fact that it fails to take into account that the nature of the refugee problem has undergone fundamental changes that call urgently for new approaches.⁹ It is important to bear in mind that flight is more than ever before the product of vicious internal conflicts. When the refugee definition is broadened it responds to regional considerations and thus provides the needed flexibility to international action on behalf of people forced to flee their countries. It also brings into light the fact that a person recognized as a refugee in one country or region may not necessarily be considered one elsewhere.¹⁰ It will be observed however that under international law the concept of a ‘refugee’ has a much more specific meaning. It refers to “a person who is forced to leave home for certain specified reasons and who, furthermore, is outside the country of his or her origin and does not have its protection”¹¹.

There is a popular argument concerning economic migrants, whether they qualify to claim for refugee status. Although these migrants are often referred to as “economic refugees”, it will be evident from the definitions that will be discussed that they do not meet the definition of a refugee. Economic migrants normally leave a country voluntarily in order to seek a better life. The reason for their fleeing is not due to fear of persecution or fear that they will not receive protection from their government. There are certain grounds on which an individual can base their fear of persecution and thus seek asylum. For instance, the 1951 Convention has five grounds; these are a well-founded fear of being persecuted for reasons of **race, religion, nationality, and membership in a particular social group or political opinion**¹². The OAU gives the following as grounds: **external aggression; occupation; foreign domination or events seriously disturbing public order in either part or the whole of one’s country of origin or**

⁸ Chimni, B.S (ed.), **International Refugee Law**. A Reader. 2002.p.1.

⁹ UNHCR, supra note 3. P.111.

¹⁰ Ibid. P12.

¹¹ Chimni, B.S (ed.), supra note 8.

¹² **1951 Convention and Protocol Relating to the Status of Refugees, Art 1(2).**

nationality.¹³ On the other hand a strong argument can be made if “one adopts a restrictive basic rights approach.”¹⁴ The argument being that persecution has been said to include a threat to an individual’s life or freedom. Therefore the basis of persecution is the denial of, or threats to, a person’s basic individual rights, traditionally understood to mean civil and political rights. If a government therefore fails to protect a person’s social, economic and cultural rights that encompass the right to employment, then perhaps it is justifiable for that individual to seek for that right elsewhere. Without employment one is bound to struggle with poverty and some scholars argue that in the midst of poverty, of what essence is the right to assemble freely, to speak freely and to have a political opinion. Alternatively, behind economic measures affecting a person’s livelihood there may be racial, religious or political aims or intentions directed against a particular group. Where economic measures destroy the economic existence of a particular section of the population (for example, withdrawal of trading rights from, or discriminatory or excessive taxation of, a specific ethnic or religious group), the victims may, according to the circumstances, become refugees on leaving the country.¹⁵

Nonetheless, those accorded refugee status flee their countries of origin because of persecution or the threat of persecution based on reasons contained in the instruments defining refugees and they cannot return home until the situation improves. Economic migrants, on the other hand, are persons who voluntarily leave their countries exclusively for economic considerations. These persons would continue to receive protection from the government upon their election to return to their countries of origin. Herein lies the core difference between a refugee and an economic migrant.

¹³ **OUA Convention. Art. 1.**

¹⁴ Maluwa, Tiyanjana, “**Refugee Problem & the Quest for Peace & Security in Southern Africa.** International Journal of Refugee Law. Vol. 7 No.4 p.664

¹⁵ Goodwin-Gill, Guy S, **The Refugee in International Law.** Clarendon University Press Paperbacks: Oxford 1996. P.55.

1.2.THE 1951 CONVENTION AND 1967 PROTOCOL DEFINITIONS

The question of who a refugee is has been a matter of concern worldwide and it is in international treaties, resolutions and declarations that one can find a definition of who today must be protected as a refugee. The 1951 Convention and 1967 Protocol are two such treaties.

The refugee problem after the Second World War led the then newly established United Nations (UN) to acknowledge that the problem of refugees and displaced persons was of immediate urgency. It was realized during this period that although the problem of refugees had assumed great dimensions compared to the past, the only international agreement signed on behalf of refugees was the London Agreement of 15th October 1946. This agreement was concerned only with the issuance of travel documents to refugees from Germany and Austria, Spanish refugees and some other smaller groups. This led to the adoption of the 1946 Constitution of the International Refugee Organisation (IRO) with the aim of harmonising the status of Second World War refugees.¹⁶ This Constitution regulated the status of the new categories of refugees. A refugee in the Constitution included four categories of persons “who had left or were outside their country of nationality or former habitual residence.”¹⁷ These categories were as follows:

- Individuals of whose status the states were in agreement, that is victims of the Nazi, Fascist or similar regimes, victims of persecution for reasons of race, religion, nationality or political opinion, and refugees of long standing, consisting altogether of some 550,000 persons;
- Persons whose status was a source of violent controversy at the drafting stages of the IRO Constitution, namely political dissidents from Eastern European Countries;
- Some 200,000 Jews remaining in Germany and Austria in respect of whom most governments accepted special protection; and

¹⁶ Kourula, Pirkko, *supra* note 6. p.120.

¹⁷ UNHCR. **Helping Refugees**, *supra* note 7. p.51.

- A group of orphans under 16 years of age who were in an unprotected position requiring the IRO assistance.

The General Assembly of the UN had to take into consideration modalities for a future international arrangement to deal with refugees with the approaching expiry of the IRO mandate. As a consequence, an Ad Hoc Committee on Refugees and Stateless persons that consisted of delegations from 13 states was appointed. Its mandate was to consider, *inter alia*, the desirability of preparing a revised and consolidated convention relating to the international status of both refugees and stateless persons and the preparation of a possible draft convention.¹⁸

In January/February 1950 the Ad Hoc Committee convened in Lake Success, New York, where the draft Convention relating to the status of refugees and a Protocol relating to the status of stateless persons, was adopted. In 1951, the Conference of Plenipotentiaries met in Geneva between the 2nd and 25th of July during the 5th Session the General Assembly. Twenty-six countries were represented at this conference. “The Convention relating to the Status of Refugees and the Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons were adopted by 24 votes to none.”¹⁹ The significance of this conference, *inter alia*, is that it expressed the conviction felt by most nations that refugees are not a temporary phenomenon. Further, that it is not a phenomenon that can be dealt with merely by half measures but the refugee phenomenon requires a concerted effort by all states concerned and that refugees should be granted such facilities that will assure them a sufficient measure of fundamental rights and freedoms.²⁰

The definition of a ‘refugee’ in the 1951 Convention is similar to the definition in the draft Convention recommended by the General Assembly. A refugee is considered to be a person who,

¹⁸ Ibid. P.53.

¹⁹ General Assembly Resolution 539(VI) of the UN dated 4th February 1952.

*Owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear is unwilling to return to it.*²¹

The drafter^S of the Convention established two groups of persons who are considered as refugees. The first group comprises what are referred to as ‘statutory refugees.’ These are persons who have already been considered as refugees under international agreements or under the Constitution of IRO. The second group embraces persons who are accorded the status of ‘refugee’ for the first time. It is divided into two sub-groups, one possessing a nationality and another without a nationality. For such persons to be considered as a refugee they have to meet two conditions, namely:-

- (a) they must be outside the country of their nationality or of their habitual residence; and
- (b) they must be there as a result of events that took place before 1st January, 1951.²²

At the time of the adoption of the 1951 Convention, the residual refugee problem in post-second world war Europe was the prevalent concern of states. The refugee definition was therefore devised for the regionally specific post-conflict purposes. The 1951 Convention could therefore only benefit persons who had become refugees as a result of the events occurring prior to 1st January 1951. It was however clear in the years following 1951 that the refugee influxes were not merely temporary results of the Second World War and its aftermath. Under the limited time frame of the 1951 Convention, refugees who emerged throughout the late 1950s and 1960s could not be granted protection. This led to the introduction of a protocol relating to the status of refugees that was opened for accession

²⁰Robinson, Nehemiah, supra note 1. P.5.

²¹ **1951 Convention and Protocol Relating to the Status of Refugees.** Art. 1(2).

on 31st January 1967 and entered into force on 4th February 1967. The Protocol extended the application of the Convention to the situation of new refugees.²³ Article 1(2) of the 1967 Protocol provides:

“For the purpose of the protocol, the term “refugee” shall, except as regards the application of paragraph 3 of this article mean any person within the definition of article 1 of the Convention as if the words “As a result of events occurring before 1 January 1951 and” ... “and the words” ... “a result of such events in article 1 A(2) were omitted.”

The key feature of this 1967 Protocol is that it removed the temporal and geographical limitations contained in the 1951 Convention. It thus updated the 1951 Convention.

The short come of the Protocol is that it failed to reconsider the refugee definition. Thus, even in light of the 1967 Protocol, the criteria for determining refugee status is still based on the five reasons of flight, namely, race, religion, nationality, membership in a particular social group or political opinion. This means that most third world refugees continue to remain *de facto* excluded under the Protocol and 1951 Convention, as their flight is frequently prompted by natural disaster, war, or political and economic turmoil rather than by ‘persecution’, as the term is understood in the Western context.²⁴

1.3. REGIONAL REFUGEE DEFINITIONS

Different regions have had different experiences in regard to refugees. Some regions in the world have not had to deal with large numbers of people seeking refuge in their borders. Still, some regions have not had so many people running away from their borders to find refuge elsewhere. The effect is that the concept of a ‘refugee’ differs somewhat from region to region. The definition of a refugee also differs because different regions incorporate different principles in the definition. Above all, the

²² Robinson, Nehemiah, *supra* note 1, p.10.

²³ Raoul Wallenberg Institute of Human Rights and Humanitarian Law. United Nations fact Sheets No. 1-25. Lund. 1998. p.385.

²⁴ Chimni, B.S, (ed), *supra* note 8, p.8.

inadequacy of the internationally accepted definition in dealing with the problems posed by the millions of externally displaced persons in the third world led to the introduction of broader refugee definitions.

For instance the ‘two-tier’ refugee definition contained in the 1969 Organisation for African Unity (OAU) Convention reflects the actual situations that give rise to the refugee problems in the region.²⁵ The term “refugee” in the African Convention shall therefore apply to

*Every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country or nationality.*²⁶

The first tier of the refugee definition in the Convention comprises the 1951 Convention definition without any geographic or temporal limitations. The intention of the drafters as regards the second tier was to ensure that it contains a declaratory statement on the interpretation of the first tier. It has been observed that the definition focuses on an assessment of the degree of the disruption of public order in the countries of origin rather than merely on individual motives of flight. The Convention is primarily important because it expands the definition of the term ‘refugee.’ The general feeling among African States was that “well-founded fear of persecution” was not sufficient to cover all the refugee situations in Africa. The definition moves away from the 1951 Convention’s ‘well founded fear’ of persecution standard which stressed that refugees included persons fleeing civil disturbances, violence and war irrespective of whether or not they have a well-founded fear of persecution. The OAU Convention governing specific aspects of refugee problems in Africa was adopted in response to the growing number of refugees fleeing wars and internal conflicts in Africa from the late 1950s.

²⁵ Kourula, Pirkko, supra note 6, p.148.

²⁶ OAU Convention Art.1, second paragraph.

Another important feature of the OAU Convention is that because it extends protection to persons who seek to escape serious disruption of public order ‘in either a part or whole’ of their country of origin, a person is not required to seek refuge in a safe part of his or her own country before seeking it outside.²⁷ This Convention, which was adopted on 10th September 1969, is considered as being the most comprehensive and significant regional treaty dealing with refugees. It is also the only legally binding regional instrument on refugees.

The definition in the OAU Convention “has maintained its validity in response to refugee situations in the African Continent, usually on the basis of prima facie status determinations”.²⁸ This, and the fact that the OAU has paid great attention to the implementation of the obligations flowing from the definition, has made it of regional, and not merely national, interest.

Until the 1970s, asylum and refugee tradition in Central and Latin America was individually oriented and based on the protection of persons suffering from persecution.²⁹ The realisation that this approach was inadequate dawned on those concerned after the outbreak of the civil strife in Central America in the 1980s. The result of the strife was massive exoduses of almost a million persons, posing serious economic and social problems for countries that were to host the refugees. This led to the adoption of the Cartagena Declaration on Refugees in 1984 by the host countries. The Declaration, like the OAU Convention, states that because of the experience gained from the massive flows of refugees in Central America, it is necessary to consider enlarging the concept of ‘refugee.’ The definition of a refugee in the Declaration is similar to that of the OAU Convention in that it is also a two-tier definition. The difference is that it has been observed that in one respect the Declaration goes further than the 1969 OAU Convention definition. It contains an expression of concern at the situation of internally displaced

²⁷ Chimni, B.S, *supra* note 8, p.8.

²⁸ Kourula, Pirkko, *supra* note 6, P168.

²⁹ *Ibid*, p.150.

persons and calls for national authorities and competent international organizations to offer protection and assistance to this category.³⁰

The second tier was to provide a definition in addition to the 1951 Convention definition. It therefore contains stricter criteria for the granting of refugee status than the one in the 1969 Convention.

It is unmistakably recommended in the Declaration that the definition of a refugee should in addition to containing the elements of the 1951 Convention and 1967 Protocol, include among refugees persons

*[W]ho have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed the public order.*³¹

Although the Cartagena Declaration is not binding on states, it is applied in practice by a number of Latin American States. In some cases it has even been incorporated into domestic legislation. There is no regional refugee definition in Europe instead; refugee status of asylum-seekers is in general determined within the 1951 Convention definition in accordance with the silver approach.³² The silver approach refers to a method of determining the eligibility of an applicant for refugee status. The three steps of this method are as follow: First, it must be determined whether there are elements that positively qualify a person to be declared a refugee and, second, whether there are elements on the basis of which a person could not have a valid claim for refugee status. Third, in some cases there may be a need to determine whether the applicant has committed acts that could result in excluding him/her from the grant of refugee status.

³⁰ Ibid, p.152.

³¹ **Cartagena Declaration. Section III Paragraph 3.**

³² Kourula, Pirrko, supra note 6, p.157.

These are known as *inclusion*, *cessation* and *exclusion* clauses. “The method is herewith called a *silver approach* due to its basically fragmentary nature.”³³

The States in the Continents of Asia and Europe as well as the Arabic States have not agreed on any particular regional refugee definitions. In fact many of the Asian States have been reluctant to become parties to the international refugee instruments.³⁴ In Europe the 1951 Convention definition of a refugee is applied in a strict manner and the process of harmonizing asylum practices continues. The term ‘refugee’ is thus used loosely, while the status of individuals who are not considered as Convention refugees is not uniform in the different European states. The position in Europe is that successful applicants become permanent settlers in the continent. When an asylum seeker fails to establish the grounds for refugee status and yet still cannot be returned to their countries of origin due to a need for protection, he or she will be granted a residence permit for humanitarian reasons. Such persons are referred to as *de facto* refugees.³⁵

~~The Asian states generally have not been willing to become parties to the international refugees instruments.~~ There is no uniform refugee definition in the region, but the ‘Bangkok Principles’, a legally non-binding document was created in an exercise aimed at providing, *inter alia*, a regional refugee definition. This definition as will be noted is not different from the definition in the 1951 Convention as modified by the 1967 Protocol. The following is the refugee definition as contained in Article 1 of the 1966 Bangkok Principles:

A refugee is a person who, owing to persecution or well-founded fear of persecution for reasons of race, colour, religion, political belief or membership of a particular social group:

(a) leaves the state of which he is a national, or the country of his nationality, or, if he has no nationality, the state or country of which he is a habitual resident; or,

³³ Ibid. p.87.

³⁴ Ibid, p.154.

(b) being outside such state or country, is unable or unwilling to return to it or to avail himself of its protection.

In spite of all the definitions examined so far, the 1951 Convention definition of a refugee continues to form the core of the refugee concept in all regions. The point to bear in mind is that there are regional variations in its application.

1.4. THE UNHCR REFUGEE DEFINITION

The background of the UNHCR refugee definition is quite political. The Soviet block resisted the whole process of creating UNHCR while the Western States agreed that UNHCR should be vested with the protection function. On the other hand the United Kingdom was of the view that the High Commissioner should concern himself with all refugees, "including in future refugee situations, as well as non-refugees who lacked the protection of their home country."³⁶ France also favoured a broad refugee definition. The United States however wanted to settle for a narrow refugee definition and a limited protection function coupled with a coordination task without the provision of material assistance.³⁷ The other western countries rejected this view; the general agreement was on discouraging the adoption of a refugee definition which would either be exclusively universal or limited only to specific categories. According to UNHCR, a refugee is a

*Person who is outside the country of his nationality, or if he has no nationality, the country of his former habitual residence, because he has or had well-founded fear of persecution by reason of his race, religion, nationality or political opinion and is unable or, because of such fear, is unwilling to avail himself of the protection of the government of the country of his nationality, or, if he has no nationality, to return to the country of his former habitual residence.*³⁸

³⁵ Ibid, P. 151.

³⁶ Ibid p.175.

³⁷ Ibid.

³⁸ UNHCR Statute Paragraph 6(B).

This definition is a compromise between the opposing views expressed above and it specifies the individuals for whom UNHCR has competence to provide international protection. The definition has been seen to have the “same individualistic thrust as the 1951 Convention definition”³⁹ and it was aimed at ensuring that UNHCR remains a small office dealing mainly with general refugee matters. It is a good thing that the Statute of UNHCR has proved to be a flexible instrument allowing for responses to the refugee problem as and when required. This is notwithstanding the fact that there has not always been commensurate financial and other support by States.⁴⁰

In this chapter several definitions of the refugee concept have been considered. It has been stated that the general definition used by the media, politicians and the general public is too narrow and inadequate. Definitions of a “refugee” were given from the 1951 Convention and 1967 Protocol. Following this were regional definitions as well as the UNHCR definition. It was noted that different regions generally have different refugee definitions because each region incorporates different principles in the definition. Nonetheless, there are rights that every refugee has and these rights should be upheld regardless of the region. The proceeding chapter will therefore discuss the rights that refugees are entitled to.

³⁹ Kourula, Pirkko, *supra* note 6, p.176.

⁴⁰ *Ibid.*

CHAPTER TWO

HUMAN RIGHTS AND REFUGEES

INTRODUCTION

As seen in the previous chapter, the refugee problem is essentially a human rights problem. Viewed from the human rights perception the refugee situation is quite abnormal and objectionable because it is a compelled separation from the homeland. "It is not voluntary migration; it is exile."⁴¹ As late as the 1980s human rights and refugee issues were viewed as falling under separate legal and institutional regimes. Now it has been realised that the direct reason for the departure of countless refugees from their countries of origin is an actual or anticipated violation of their rights. In other words the refugee's need for international protection arises from the violation of their rights. Consequently, this "coerced departure is a violation of the human right to remain peacefully in one's home."⁴² In countries such as Iraq, Bosnia and Herzegovina, Myanmar, Guatemala and many others it has been evident that human rights violations have been at the core of major humanitarian emergencies.⁴³ Sadako Ogata, the incumbent High Commissioner for refugees was quoted as stating, "the root causes of refugee displacement are inextricably linked to conflict, persecution and denial of human rights."⁴⁴

The bottom line is that the very existence of refugees and other forcibly displaced people, is a measure of a society's incapacity to resolve its differences by peaceful, rather than violent means.

This chapter focuses on the rights that refugees are entitled to, but before these rights can be considered a general overview of human rights will be given. Subsequently, the right to seek and attain asylum will be discussed and the effect of HIV/AIDS on this right will

⁴¹ Ibid, p.23.

⁴² UNHCR. **The State of the World's Refugees. The Challenge of Protection**, supra note, 5, p.22.

⁴³ Ibid.

⁴⁴ Bayefsky, A.F. & Fitzpatrick, J, (Eds). **Human Rights and Forced Displacement**. 1998. P.27

also be considered. Following this will be a look at the principle of non-refoulement. Finally, the rights based on international standards will be considered.

2.1. AN OVERVIEW OF HUMAN RIGHTS

Human rights are claims that every individual has upon his society by virtue of being endowed with reason and conscience. Every human being regardless of geography, gender, race, ethnic group, religion, political opinion, social status, national origin, is entitled to human rights. Human rights are meant to protect human dignity and ensure justice and peace.⁴⁵ Most people flee their homeland when their right to live in peace and safety in their homeland is violated or when they fear the violation of such right. The UDHR stipulates the rights that states are obliged to protect. These rights are given a binding nature in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These instruments and others identify the state as the primary defender of rights such as the right not to be subjected to torture or to arbitrary detention and the rights to freedom of expression, thought and belief. Unfortunately, as the number of refugees increases, the responsibility of states towards their citizens is being scrutinized more and more. Furthermore, as the number of refugees increases it becomes evident that most states have failed in their duty to defend citizens against violation and unfortunately at times they have been the perpetrators of the violations themselves. “Protection against the most threatening forms of abuse, such as arbitrary killings, detention, torture and disappearance, can have a profound impact on the cycle of violence and fear that impels so many people to flee.”⁴⁶

All human rights are universal, indivisible, interdependent and interrelated. States have a duty, regardless of their political, economic, and cultural system to promote and protect all human rights and fundamental freedoms.⁴⁷ Therefore, governments need to guarantee the basic human rights and physical security of their citizens. When civilians became

⁴⁵ Chanda, A.W. **Human Rights in Zambia's Third Republic: An Overview.** Legality Journal. UNZA: LAZ. 1998, P.59.

⁴⁶ UNHCR. **The State of the World's Refugees: The Challenge of Protection**, supra note, 5, P.22.

refugees, this 'safety net' disappears. Therefore, it is essential that the appropriate authorities and organizations such as UNHCR, ensure that states are aware of, and act on, their obligations to protect refugees as they seek asylum. "Indeed, the concept of the state's responsibility towards its citizens is being extended to encompass a responsibility towards the international community for the way those citizens are treated."⁴⁸ The rights of refugees are governed, inter alia, by the right to seek and enjoy asylum in other countries from persecution as well as by the principle of non-refoulement. These and other fundamental rights of refugees will be discussed in this chapter.

2.2. THE RIGHT TO SEEK AND ATTAIN ASYLUM

The right to seek and enjoy asylum from persecution is not expressed in the 1951 Convention or the 1967 Protocol. Rather, it was at the time of drafting the Universal Declaration of Human Rights (hereinafter "the UDHR") 1948 that this right was introduced at international level.⁴⁹ Initially, the view was that individuals could have a right to be granted asylum. However, at the end of the day the states concurred with the British delegation that individuals should only have the right to seek and enjoy asylum *from persecution*. Thus the wording of Article 14 of the UDHR: ***1. Everyone has the right to seek and to enjoy in other countries asylum from persecution.***

This right is quite fundamental, and indeed, a basic human right. "Today, asylum remains the cornerstone of international refugee protection. It is the principal means through which states meet their obligations towards refugees on their territory."⁵⁰ Despite this being the case, it has been observed that the institution of asylum in international law is controversial due to its ambiguity. Its ambiguity stems from the fact that although the UDHR is the embodiment of this right, states are not bound to grant asylum. It has been noted that there is no treaty or convention that obliges states to grant

⁴⁷ Kourula, Pirkko, supra note 6, P.72.

⁴⁸ Ibid, p.22.

⁴⁹ Ibid, p.273.

⁵⁰ UNHCR, **The State of the World's Refugees: The Challenge of Protection**, supra note, 5, P.32.

asylum.⁵¹ While an individual has a right to seek asylum, a state, on the other hand, has discretion in deciding who shall be granted asylum. It is interesting to note that the term ‘asylum’ in international law “means only the right for a state to grant asylum; there is no corresponding right of an individual to be granted asylum.”⁵² Thus, each state decides who to admit and why. Nonetheless, in practice the decisions are guided by circumstances beyond the host country’s control. For example, states are initially forced, so to say, to receive asylum-seekers crossing their borders in large numbers. As a consequence of legal and practical considerations, state practice in granting asylum varies widely. The result is that in many states various cover-ups are being used to deny refugees asylum.

On the regional level the situation is somewhat different. The 1969 OAU Convention provides for asylum in Article II. According to this Convention, Member States of the OAU should use their best endeavours in line with their respective legislations to receive refugees and to secure their settlement.⁵³ It further provides that the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.⁵⁴

Nonetheless, many States fear that their territories will be swamped with asylum seekers. States have reacted differently towards this fear. Some reactions have been defensive while others have been constructive.⁵⁵ An example of the latter is preventing people from seeking asylum by making it virtually impossible or simply difficult to reach or cross borders. The other is lowering the standards of treatment of refugees with the aim of deterring further arrivals: - a process labeled ‘human deterrence’. This increasing unease and restrictiveness is evident even in African countries such as Malawi that have been known to be the most hospitable in hosting refugees. Malawi has in the past hosted over a million Mozambican refugees but as a result of the rising number of refugees and

⁵¹ Ibid, p.32.

⁵² Melander, Goran, **Refugees with no Country of Asylum: Strategies for Third-Country Resettlement**, p.39.

⁵³ Article II(1).

⁵⁴ Article II(2).

⁵⁵ UNHCR, **The State of the World’s Refugees: The Challenge of Protection**, supra note, 5, p.34.

economic difficulties the government was led to fence camps and restrict movement of refugees in 1992.⁵⁶ Malawi is not the only country that has reacted in this manner; there are signs that the quality of asylum is deteriorating in many other parts of the world as well. On the other hand, the international community has responded in a humanitarian manner on occasion. One such example is the development of a comprehensive Plan of Action that resulted from the prevention of Vietnamese boat people and refugees from landing on the shores of South East Asia following an increase in the numbers during the late 1980s. The said plan of Action “has been largely successful in bringing the exodus of boat people to a satisfactory conclusion.”⁵⁷ Another illustration is how the refusal of Turkey to allow Iraqi Kurds cross its border in 1991 led to an unprecedented, multilateral military intervention on humanitarian grounds.⁵⁸ In addition, in 1993, states reaffirmed the right of everyone to seek and enjoy in other countries asylum from persecution at a World Conference on Human Rights held in Vienna June 1993. At this conference the Vienna Declaration and Programme of Action were adopted.⁵⁹

It is important to bear in mind that when countries implement strict visa controls, carrier sanctions and other measures used to restrict access to borders, asylum-seekers are often forced to arrive at or enter a territory illegally in order to exercise their rights under the above-mentioned article.⁶⁰ Further, refusal to grant asylum leaves refugees without protection and exposes them to serious danger.

Due to the fact that refugee movements are by nature unplanned, sudden and erratic “the principle of refugee law stipulates that refugees should not be penalized on account of their illegal or undocumented entry.”⁶¹ This is provided they report swiftly to the authorities of the country in which they seek protection.

It has been stated that the ‘so-called’ right of asylum is nothing more than the competence of every state to allow a persecuted alien to enter and to remain on its

⁵⁶ Ibid, P.35.

⁵⁷ Ibid, p.34.

⁵⁸ Ibid.

⁵⁹ Kourula, Pirkko, supra note, 6, p.71.

⁶⁰ Internet, **Rights for All: Amnesty International**. p.1 of 12.

⁶¹ UNHCR, **Introduction to International Protection. Emergency Management Training Program**.1996, p.4.

territory under its protection and thereby to grant asylum to him. This is regardless of the alien's race, colour, gender, disabilities or health, etc.

Effect of HIV/AIDS on the Right to Asylum

The HIV/AIDS pandemic must be discussed within the framework of the international refugee protection regime. This is as laid out in the 1951 Refugee Convention and other international human rights instruments that provide for the respect of the rights of persons affected by HIV/AIDS.⁶² Article 33 of the 1951 Refugee Convention requires that states that have acceded to the Convention may not expel or return to a city where the refugee's life or freedom is threatened. This is known as the principle of 'non-refoulement'. The basic rule would therefore seem to be that refugees who appear at various borders and are in a particular country have a right to stay in the country no matter what their health status may be. Thus, once it is determined that an individual in a particular country or its borders is in fact a refugee, that individual should not be excluded from the country for testing positive for HIV.

In addition, UNHCR opposes, without excuses, the mandatory HIV testing of refugees. This is in order to avoid the indirect violation of human rights through the discrimination of individuals who test positive for HIV.

The above is the ideal, but in reality only a few countries adhere to the rules when it comes to equal treatment of all asylum seekers, including those who have HIV/AIDS. Canada, which is bound by the 1951 Refugee Convention, strives to adhere to its obligations. Thus, persons in Canada determined to be Convention Refugees (i.e. those who fall under the definition in the Convention) have a right to stay in Canada, to work in Canada and to become permanent residents of Canada regardless of their medical condition.⁶³

⁶² Women's Commission for Refugee Women & Children, **Refugees and Aids (What should the humanitarian Community do?)** 2002, P.9.

⁶³ Klein, Alana. **HIV/AIDS and Immigration: Final Report**. Canadian HIV/AIDS Legal Network. 2001, p.22.

Although refugee claimants are required to undergo medical examinations within a specified reasonable period of time, a Convention refugee's medical condition will have no legal bearing on their right to remain in Canada. In other words, refugees, although required to undergo HIV testing under the same conditions as all other immigrants, are not barred from admission into Canada for any positive test.⁶⁴ Actually, in Canada HIV/AIDS has been, at times, a basis of a refugee claim. This entails that not only must persons with HIV/AIDS in Canada who are found to be Convention refugees be granted the right to remain in Canada despite being diagnosed HIV-positive, but in some cases, persons might be granted refugee protection precisely because they are HIV positive. For such a claim to succeed, claimants must show that they have a well-founded fear of persecution owing to their "membership to a particular social group."⁶⁵ In addition to this, claimants also must show that they were unwilling or unable to avail themselves of the protection of their country of habitual residence. The following are authorities of HIV/AIDS based persecutions that have been successful refugee claims.

1. Re GPE (1997)⁶⁶

In this case the Immigration and Refugee Board of Canada accepted that the claimant, if returned to Mexico, would face inadequate state protection from harassment as a gay man and would also be persecuted as a person who is HIV-positive.

2. Re OPK (1996)⁶⁷

In this case the Board accepted that a gay man with HIV from Singapore had good grounds for fearing persecution based on his sexual orientation and his "Aids condition."

3. Re TNL (1997)⁶⁸

This is a case in which a Polish former drug user with HIV was found to be a Convention refugee as a result of persecution faced by people with HIV/AIDS in Poland. The Canadian Immigration and Refugee Board held that the harm feared by the claimant was

⁶⁴ Ibid.

⁶⁵ Ibid, p.23.

⁶⁶ CRRD No. 215 (QL).

⁶⁷ CRDD No. 88 (QL).

serious enough to constitute persecution (as opposed to mere discrimination, which would not be sufficient to support a refugee claim).

One thing that should be acknowledged and realized is that mandatory testing of refugees and asylum-seekers does not stop the spread of the virus in anyway.

2.3. PRINCIPLE OF NON-REFOULEMENT

The principle of non-refoulement “prohibits the expulsion or forcible return of refugees to a country where they may have reason to fear persecution or other threats to their lives, liberty or security.”⁶⁹ This principle complements the right to seek and enjoy asylum from persecution as expressed in Article 33. The said Article stipulates that

“no contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of particular social group or political opinion.”

This principle is at the very core of refugee protection as it plays an essential role in protecting people whose right to remain at home has been violated. It has gained universal recognition through regional refugee instruments as well as international law. This principle is also expressed in Article 11(3) of the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and Article 3(1) of the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter “CAT”), which extends the principle to any state.

The principle of non-refoulement places an obligation on states in which refuge is sought to conduct themselves in conformity with the standards set in international protection. The principle is linked to the rights to life, security and freedom from torture or other cruel, inhuman or degrading treatment or punishment. Thus refugees should not be

⁶⁸ CRDD No. 251, No. 195-7647 (QL).

⁶⁹ UNHCR, *The State of the World’s Refugees: The Challenge of Protection*, supra note, 5, p. 171.

serious crime, constitutes a danger to the community of that country.”

Nonetheless violations of the principle of non-refoulement have taken place and have affected large numbers of individuals. The case of **Sale Vs. Haitian Centers Council (1993)** that concerns the return of refugees from a state's frontiers is an authority for the above assertion. In this case the Supreme Court of the United States of America upheld the view that interdicting asylum-seekers on the High Seas was not violative of the letter and spirit of the 1951 Convention. This decision has been described by the High Commissioner for Refugees 'as a setback to modern international refugee law'.

It has been observed that international activities on behalf of refugees currently take place in a broad political, economic, social and military context. Therefore, safeguarding all human rights of refugees on an equal footing is of paramount importance.

Apart from the connection between human rights law and the right to enjoy asylum and the principle of non-refoulement human rights law complements refugee law by ensuring that refugees are treated in accordance with international standards in host countries. These human rights standards are also reflected in most national legal systems.

2.4. RIGHTS BASED ON INTERNATIONAL STANDARDS

Refugees are entitled to rights in the countries where they seek asylum. International protection entails that States providing asylum should not discriminate against refugees. They should be allowed to enjoy at least the same civil, social and economic rights that are enjoyed by other legal immigrants. These rights include the freedom of thought and of movement, access to medical care, schooling and the right to work. It is acknowledged on the other hand that there are times when the hosting government may not have adequate resources to provide for the economic rights of refugees. As such "UNHCR and other international organization provide assistance such as financial grants,

food, tools and shelter, schools and clinics.”⁷² At the already mentioned World Conference on Human Rights held in Vienna June 1993, certain declarations were made in respect of certain specific rights that have a bearing on the international protection of refugees. It was thus declared and reaffirmed, inter alia, that,⁷³

1. Victims have a right to be assisted by humanitarian organizations as set forth in the 1949 Geneva Convention and other relevant instruments of international humanitarian law, calling for ‘the safe and timely access for such assistance’.
2. Extreme poverty and social exclusion constitute violations of human dignity
3. Gross and systematic violations of human rights include torture and cruel, inhuman and degrading treatment or punishment, summary or arbitrary executions, disappearance, arbitrary detentions, all forms of racism, racial discrimination...other denials of economic, social and cultural rights, religion intolerance...and lack of rule of law.
4. Freedom from torture is a right that must be protected under all circumstances including in times of internal or international disturbance or armed conflict.

The basic principle is that as a matter of conscience and of law, all people, irrespective of their legal status within a country, must be treated with humanity and in a way that preserves their “right to dignity and physical, mental and moral integrity.” This principle was at the core of the decision in **R Vs. London Borough of Hammersmith *ex parte A and London Borough of Lamseth *ex parte X****⁷⁴, where it was decided that a total denial of social support to certain asylum-seekers would almost certainly put the United Kingdom in breach of the European Convention on Human Rights and of the 1949 Geneva Convention.

In conclusion, it must be pointed out that in order to prevent conditions that force people to become refugees, human rights must be safeguarded. This is the key element in protecting refugees and is of critical importance to finding solutions to the refugee problem. The international community must now concern itself with conditions that until recently would have been treated as internal matters. These include violations of human

⁷² UNHCR, **Protecting Refugees, Questions and Answers**, 2001, p.7.

⁷³ *Ibid*, p.72.

rights, repression of minorities, indiscriminate violence and persecution. Such conditions affect other countries by causing an outpouring of refugees and as such cannot be seen as merely falling exclusively within the realm of domestic concern.

In as much as the right to seek and to enjoy asylum must be acknowledged and upheld, the right not to be unjustly compelled to leave home is of paramount importance and central as a solution to the refugee problem.

In this chapter it has been pointed out that there is a link between human rights law and refugee law. This link results from the fact that violations of human rights during conflicts are the main source of the mass exoduses that have occurred. Respect for human rights is therefore a necessary condition for both preventing and resolving today's ever-increasing number of refugees. On the other hand, where there is failure in respecting human rights and refugees are 'created', states and international organizations have the legal responsibility for the protection of refugees. In the refugee context the most important international organization is the United Nations High Commissioner for Refugees (hereinafter referred to as 'UNHCR'). In the next chapter a historical background of this organization will be given and its roles and functions will be critically discussed.

⁷⁴ HC 8 October 1996

CHAPTER THREE

THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES

INTRODUCTION

In order to provide refugees the international protection that is a necessity in resolving the refugee problem, certain “players” are essential. As mentioned in the preceding chapter, national governments and state institutions are key “players” in guaranteeing and protecting the rights of their citizens, but where the international community recognizes a lack of national protection, international protection is invoked as an alternative. In the context of refugees, international protection refers to a situation where the international community extends protection when “it recognizes the specific needs of people who have valid reasons to fear that their own government will not or cannot provide safeguards against abuse.”⁷⁵ International protection is merely a means of providing a temporary substitute for the normal protection that is provided by the state of one’s nationality, until such a time as the refugee can once again be accorded national protection.⁷⁶ States are what essentially form the international community. These states accord special responsibilities to international organizations and in the refugee context, the United Nations High Commissioner for Refugees (hereinafter ‘the UNHCR’) is of paramount importance and is at the core of this chapter’s discussion.

3.1. HISTORY OF UNHCR

The realisation and acceptance that neither individual governments nor charitable organizations were the only ones to provide refugees with protection can be traced as far back as the time of the League of Nations. It was at this time that the international community was deemed to be the protector of the rights of refugees and given the mandate of finding solutions to refugee problems.

⁷⁵ UNHCR, *Introduction to International Protection*, Emergency Management Program. 1996. P.2.

⁷⁶ Ibid.

As a result of World War I, the Russian Revolution and the collapse of the Ottoman Empire, there was a mass movement of people in Europe and Asia Minor.⁷⁷ Refugees were defined by the League of Nations as specific groups of people who were deemed to be in danger if they returned to their home countries. “The League’s first action on behalf of refugees took place in 1921, when it created the position of High Commissioner for Russian Refugees and elected Fridtjof Nansen to fill it.”⁷⁸ As new refugee situations emerged over the years, the League had to set up organizations and agreements to handle them. The category of refugees was being extended from time to time to cater for such groups of people as the Assyrians, Turks, Greeks, Armenians, Spaniards and Austrian and German Jews and many more. Upon the replacement of the League of Nations by the United Nations, the International Refugee Organisation (hereinafter ‘IRO’) was established in 1947.

IRO’s mandate was to protect the already existing refugee groups and one new category, that of the two million refugees who were scattered throughout Europe after World War II. Initially, IRO was merely concerned with repatriation, “but the political build-up to the cold war tilted the balance instead toward resettlement of those who had valid objection to returning home.”⁷⁹ An example of one such objection was persecution, or fear of persecution because of race, religion, nationality or political opinions. The office of the UNHCR replaced the IRO in 1951, at a time when international protection was firmly enshrined as the new organisation’s principal *raison d’etre*.⁸⁰

The UN General Assembly Resolution 428 (V) of 1950 on 14th December established the office of UNHCR.⁸¹ Initially it was to function on a temporal basis for 3 years to help resettle the 1.2 million refugees left homeless as a result of World War II. As it became evident that refugee issues required continued attention, its mandate began to be

⁷⁷ UNHCR, *The State of the World’s Refugees: The Challenge of Protection*, supra note, 5, p.10.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid, p.12.

⁸¹ Ibid, p.169.

extended; “consequently, the Assembly has renewed UNHCR’s mandate for successive five year periods.”⁸²

The purpose behind the establishment of UNHCR was to provide international protection to refugees as well as to seek permanent solutions to the refugee problem. Thus, since January 1951, UNHCR has been responsible for protection refugees and promoting lasting solutions to their unending problems.⁸³

3.2. ROLE, FUNCTION AND DUTIES OF UNHCR

UNHCR’s founding Statute⁸⁴ provides a guideline of what the organization’s roles, functions and duties are. According to this Statute, UNHCR is competent to assist

“any person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, or political opinion, is outside the country of his nationality and is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear or for reasons other than personal convenience, is unwilling to return to it.”

It is from this definition that the core of UNHCR’s mandate is derived. As illustrated by the said definition, UNHCR’s role is that of a humanitarian nature and clearly non-political. The organization has been given two main and closely related functions, “to protect refugees and to promote durable solutions to their problems.”⁸⁵ Ultimately, the most important duty of UNHCR is international protection. It has been repeatedly

⁸² Ibid.

⁸³ UNHCR, **Introduction to International Protection**, supra note, 71.,p.7.

⁸⁴ **Resolution 428(V) of UN General Assembly.**

⁸⁵ UNHCR, **The State of the World’s Refugees: The Challenge of Protection**, supra note, 5, p.169.

acknowledged that the protection of refugees remains UNHCR's *raison d'être*. For the organization to find lasting solutions to the plight of refugees, it becomes imperative to place protection at the core of all efforts being made to aid refugees. UNHCR must thus ensure that refugee's basic human rights are respected and further that no person will be returned involuntary to a country where he or she has reason to fear persecution.⁸⁶ In order to achieve this, UNHCR gets directly involved in promoting international refugee agreements and monitors government compliance with international refugee law. Its humanitarian role is also evident from the fact that UNHCR staff work in various locations-from capital cities to remote camps and border areas. According to reliable sources, "as of June 1993, UNHCR employed 3,703 staff members to carry out its functions. Of these, 810 were stationed at its Geneva Headquarters and 2,893 were deployed in some 177 field offices in 106 countries."⁸⁷ This is not a permanent geographical indication of UNHCR's presence; the organisation's presence changes in accordance with the needs of refugees as new situations and solution possibilities emerge. This is necessary in order to provide protection and reduce the threat of violence, including sexual assault, which many refugees are subjected to, even in countries of asylum.⁸⁸

As a means of seeking durable solutions, the organization helps refugees repatriate to their homeland if conditions are conducive. In the alternative, refugees are helped to integrate in their countries of asylum or to resettle in third countries.

Where refugees are returned home voluntarily, UNHCR monitors both the living and working conditions of the repatriated population. At times the organization takes a further step and finances projects to help both the returnees and local communities.⁸⁹ A practical example is that provided by the situation that prevailed in Mozambique. In the 1990's, after the end of a civil war, approximately 1.7 million Mozambique refugees returned home. UNHCR spent "\$100 million providing emergency food, seed, tools and financing

⁸⁶UNHCR, **Helping Refugees**, An Introduction to UNHCR, 1998. p.7.

⁸⁷UNHCR, **The State of the World's Refugees: The Challenge of Protection**, supra note, 5, p.171.

⁸⁸UNHCR, **Helping Refugees**, supra note, 82, p.7.

a series of projects to repair roads and bridges, drill wells and build schools and health centers.”⁹⁰ Further, in 1992 the organization helped 2.4 million refugees return home voluntarily.⁹¹ In addition to these good deeds, the organization in June of 2002 donated 21 vehicles worth K2.2 billion to the Zambian government and its other partners in the country. 5 of the said vehicles were to be for the government, 2 for Care International while Red Cross and Lutheran World Federation were allocated 3 vehicles each. The others would be allocated upon identification of relevant organizations that were in need.⁹² It cannot be denied therefore that UNHCR has an important role to play in mobilizing financial support for humanitarian relief assistance and rehabilitation programmes where repatriation is successful. Although not mentioned in the organisation’s Statute, this has become one of its principle functions in addition to protection and the promotion of solutions.

It must be pointed out though that at times voluntary repatriation is not ideal depending on the conditions in the country of origin. UNHCR will not promote repatriation unless it is convinced that refugees can be guaranteed safety once they return home. Unfortunately, many refugees have returned to situations of devastation, uncertainty and insecurity in many instances.⁹³

In cases where voluntary repatriation is not possible, UNHCR strives to help refugees to either integrate in the country where they first sought asylum or to resettle in a third country where they can have a chance at finding work and resuming their lives. In order to ensure that refugees are protected in countries where they seek asylum, UNHCR sees to it that refugees are granted legal status. This has to be done with the agreement of the government of the asylum country and as pointed out in the previous chapter, as the numbers of refugees escalate, settlement opportunities are being restricted. Host countries have their own problems to deal with such as trying to improve the lives of their citizens without having to worry about refugees and other foreigners. Zambia provides an ideal example. The Post Newspaper on Friday June 14th 2002 carried an article

⁸⁹Ibid, p.15.

⁹⁰ Ibid.

⁹¹ Ibid, p.172.

⁹² The Post Newspaper, **Food insecurity will affect refugee supplies**, June 14, 2002.

entitled “Food insecurity will affect refugee supplies.” The speaker was quoted as stating, “since October last year we have been giving half food rations to the refugees and with the given food situation in Zambia rations in our camps will be complicate. If the nationals are suffering due to drought, by extension the refugees are affected too. But we are taking measures as a Commission with our partners the World Food Programme and the Zambian government to mitigate the problem.”

Although initially UNHCR was specifically responsible for refugees found in Europe, “additional criteria have been progressively introduced to accommodate the evolving nature of refugee flows in recent decades.”⁹⁴ Indeed UNHCR has taken on more responsibilities than was originally anticipated. This has been necessary in order to tackle the problem of refugees that has become more complex as it has taken on a global element. UNHCR has therefore had “to expand its relief and emergency operations and in recent years has been called upon increasingly to help other groups of people living in refugee-like situations.”⁹⁵ This has entailed granting protection on humanitarian grounds or group basis to people who have not been formally recognized as refugees. It was under such conditions that UNHCR was in November 1991 asked to take on the role of lead UN agency for humanitarian assistance to victims of the conflict in former Yugoslavia by the Secretary –General. “By July 1993, it was continuing to provide massive humanitarian relief to roughly 2.3 million internally displaced people and war victims in Bosnia and Herzegovina.”⁹⁶

In its role as a promoter and guardian of refugee rights, UNHCR carries out the following duties:⁹⁷

1. It encourages governments to subscribe to international and regional conventions and arrangements concerning refugees, returnees and displaced people and ensures that the standards that are set out are effectively practiced.

⁹³ UNHCR, *State of the World’s Refugees: The Challenge of Protection*, supra note, 5, p.172.

⁹⁴ Ibid, p.170.

⁹⁵ Ibid.

⁹⁶ Ibid, p.171.

⁹⁷ Ibid.

4. It promotes the granting of asylum to refugees. As such it ensures that they are admitted to safety and protected against forcible return to a country where they have reason to fear persecution or other serious harm.
5. It ensures that applications for asylum are examined fairly and that asylum-seekers are protected, while their requests are being examined, against forcible return to a country where their freedom or lives would be endangered.
6. It ensures that refugees are treated according to the recognized international standards and that they receive legal status, as well as, in as far as it is possible, the same economic and social rights as nationals of the country in which they have been given asylum.
5. It aims at helping refugees cease being refugees through such means as voluntary repatriation to countries of origin, or alternatively if this fails, through acquisition of the nationality of their country of residence.
6. It also tries to help refugees who return to their home country to reintegrate. This is done in close consultation with governments concerned.
7. It promotes the physical security of refugees, asylum-seekers and returnees, especially safety from military attacks and other violent acts.
8. It also plays a role in the reunification of refugee families.

In addition to the organisation's role in promoting voluntary repatriation and helping refugees find asylum, it also has programmes that facilitate its quick response to emergencies. Since the beginning of the 1990's, UNHCR has established emergency operations in a number of crises. "A \$25 million emergency fund allows UNHCR to provide a rapid response to new refugee situations."⁹⁸ Appeals are nonetheless made to

⁹⁸ Ibid, p.172.

the international community to help in raising funds where the initial assistance proves to be insufficient. This was the situation in 1991 when the refugee situation in the Persian Gulf proved to be an enormous challenge. The Danish and Norwegian Refugee Councils and UN Volunteers provided assistance to UNHCR and continue to do so, thereby enabling the organization respond to emergencies with increasing speed.

It has thus been shown that UNHCR is an operational agency with specific responsibilities in the human rights field. UNHCR has been accorded such responsibilities not against States, but rather in cooperation with States. On the other hand since the organisation advocates for the needs and rights of refugees it is inevitable that frictions will arise between the organisation and authorities in given States. Nonetheless, both the States and UNHCR must look at each other as being partners in the struggle of finding solutions to the refugee crises and in protecting and promoting refugee rights.

It must be noted that looking at the situation on a global level, it is necessary at this time to give support to the peace process in all war torn countries. This is in order to try and mitigate the number of people who flee from their countries for fear of being killed in armed conflicts. It could provide for a part solution to the refugee situation. For example, following peace prospects in Angola 4,000 refugees left Zambia and returned home on spontaneous basis.⁹⁹

In this chapter an account of UNHCR's history has been given and its role, function and duties have been discussed. On the other hand, one must wonder to what extent UNHCR will succeed in achieving or carrying out its mandate as the number of refugees continues to increase. This question cannot be answered easily as it deals with the future, but what can be assessed is the organisation's effectiveness from its inception to date. This will be done in the next chapter by looking at one case study, namely, that of Zambia.

⁹⁹The Post Newspaper, *supra* note, 92.

CHAPTER FOUR

THE EFFECTIVENESS OF UNHCR: ZAMBIAN CASE STUDY

INTRODUCTION

Compared to its neighbours, Zambia enjoys a stable political environment. It is one of the few countries that has not experienced civil wars or strife in the recent past. Consequently, Zambians rarely flee the country due to fear of persecution based on race, colour, religion, sex, etc. Zambians are known on the other hand to have left the country for purposes of seeking a better livelihood.

Zambia has a stable political environment, thus, the country has provided a favourite “safe haven” for many refugees who have fled from neighbouring countries. The political and military conflicts in the Great Lakes region have resulted in the outflow of millions of refugees into neighbouring countries, Zambia inclusive. This has not always been the case because in the past, the Zambian policy on refugees was ‘cautious.’¹⁰⁰ Immediately after independence Zambia adopted a refugee policy that was generous to say the least, but this was altered to some extent in the period following the Unilateral Declaration of Independence of Zimbabwe (then Southern Rhodesia).¹⁰¹ The reason for this alteration was given at the Africa Refugee Conference. It was stated by the government that,

“owing to its four years Development Plan designed to meet the rising expectation of its people and the illegal declaration of independence by Rhodesia, the reception policy of Zambia is that it is not in a position to accept an unlimited number of refugees. Consequently for the present, the policy is to accept only those refugees for whom Zambia is the first asylum country; for others (e.g.

¹⁰⁰ Sakala, Mabvuto, **Zambia’s Asylum and Refugee Law and its Practice. To what extent does it comply with International Conventions and Norms?** UNZA: Lusaka, 2001. p.10.

¹⁰¹ UNHCR, **Refugees and Refugee Assistance in Zambia.** General Information Paper No.2 January 1987.

South Africans) only transit facilities are given. ¹⁰²

As a result of this statement the Zambian government took great care and were very cautious in the manner of granting refugee status. However, the government policy towards refugees began to change towards the end of the 1960's. The policy began to take a liberal stand and

*“the most significant liberalization step of refugee policy taken by the Zambian Government was its ratification in 1969 of the OAU Convention governing Specific Aspects of Refugee Problems in Africa and accession to the 1951 UN Convention on Refugees and its Protocol Relating to the Status of Refugees of 1967.”*¹⁰³

The law that regulates the issue of asylum seeking and refugees in Zambia currently is the 1970 Refugee (Control) Act.¹⁰⁴ In addition to this, there is subsidiary legislation pertaining to refugee settlements. Zambia has to implement the above legislation in conformity with the instruments to which it has bound itself. In 1969, on 24th September, the Zambian government acceded to the 1951 Convention Relating to the Status of Refugees together with its 1967 Protocol. In addition, the government ratified the 1969 OAU Convention governing the specific aspects of refugee problems in Africa.

The government, with regard to the applicability of some provisions of the 1951 Refugee Convention, made a number of reservations. An example is Article 26 that provides for freedom of movement. The reservations in its application require that refugees reside in designated refugee settlements or camps. Certain exceptions are allowed and thus some refugees live outside camps and are able to run businesses or attend schools, universities or colleges. Notwithstanding these reservations, “the Zambian government has maintained a generous asylum policy for the past three

¹⁰² African Refugee Conference. No.1. 1967.

¹⁰³ UNHCR, **Refugees and Refugee Assistance in Zambia**, supra note 101.

decades.”¹⁰⁵ Thus, Zambia is currently hosting refugees from Burundi, DRC and Rwanda.

This Chapter will focus on the different groups of refugees that the Zambian government is hosting. The Angolan and Congolese refugees are the two groups that will be given the most attention. For each one, a historical account will be given as well as recent developments in the countries of origin. Thereafter an account of the workings of UNHCHR in Zambia will be given for the purposes of assessing the organisation’s effectiveness in fulfilling its functions. This will be followed by a look at the constraints that inhibit the work of UNHCR in Zambia.

4.1 THE REALITY OF REFUGEES IN ZAMBIA

It suffices to say that refugees in Zambia are classified according to their countries of origin as well as according to where they have settled in Zambia. Those that are prevalent are Angolan refugees, Congolese refugees and urban refugees.¹⁰⁶

4.1.1 Angolan Refugees

The war for Angolan national liberation began in 1961 in the northwest and in the capital. The main cause was the reluctance of the Portuguese to follow the examples set by other colonial powers in withdrawing from their possessions in Africa.¹⁰⁷ Fighting began in Angola immediately after two liberation movements (UNITA and MPLA) had organized villagers and townsfolk in Moxico and Cuando Cubango districts in 1966. The rural Angolans were therefore faced with five choices:¹⁰⁸ 1) join the freedom fighters; 2) move to “*aldeamentos*” or fortified villages protected by the Portuguese; 3) flee to Zambia, Zaire, or resort to internal asylum in unaffected areas of Angola; or 5) remain in their villages and be killed. Statistics indicate that most

¹⁰⁴ Chapter 120, Volume 9 of the Laws of Zambia.

¹⁰⁵ UNHCR, 2001 Global Appeal. “Zambia in Short,” p.128.

¹⁰⁶ UNHCR, 2002 Global Appeal, p.125.

¹⁰⁷ Rogge, John. R, *Too many too long: Sudan’s twenty year Refugee Dilemma*. Rowanan & Allanheld: New Jersey, 1985. p.402.

¹⁰⁸ Hansen, Art, *Refugee Dynamics: Angolans in Zambia 1966 to 1972*. (IMR Vol. 15 No.1).

Angolans opted to resort to the third choice and fled to Zambia. According to Hansen (1977), “about 4,000 people fled into Zambia in 1966, rising to a total of 22,000 by 1973.”¹⁰⁹

The late Jonas Savimbi founded Unita-The United National Union for the Total Independence of Angola-in the late 1960’s as a rival movement to the MPLA which later became the government. From the time Angola gained its independence in 1975 to mid 2002, there was a power struggle between the late Jonas Savimbi’s UNITA movement and the government of Eduardo Dos Santos. This power struggle has been a cause of serious civil war that is estimated to have killed more than 500,000 people and displaced hundreds of thousands of others.¹¹⁰ According to recent statistics, 81,442 Angolan refugees were being assisted by UNHCR in Zambia at the end of June 2001.¹¹¹ Most of these refugees have been settled in camps, the common ones being Nangweshi and Mayukwayukwa in the western province, Maheba in the northwest and Ukwimi, a resettlement area in the eastern province. As the military conflicts continued in Angola, more refugees were crossing into the borders of Zambia. As a consequence, the number of refugees in camps was constantly increasing; in fact Nangweshi camp has already reached its full capacity and yet it was only opened in 2000 to cater for the new influxes. UNHCR had planned to resettle 10,000 Angolan refugees living in Zambia back in Angola in 1998 but the plan had to be abandoned.¹¹²

Repatriation would greatly aid in reducing the number of refugees. Events now seem to indicate that refugees from Angola will be repatriated. After the death of UNITA leader Jonas Savimbi, who was killed by the government, there have been signs of peace in Angola. The following news headlines illustrate this hope for peace:

- **“Angola’s warring parties being urged to seize opportunity for peace presented by death of veteran rebel leader Jonas Savimbi”¹¹³**

¹⁰⁹ Ibid, p.183.

¹¹⁰ Zambia Daily Mail, **Angola’s warring parties being urged to seize opportunity for peace presented by death of Jonas Savimbi**. Vol. 12 No.54 Monday February 25, 2002.

¹¹¹ **2002 Global Appeal**, supra note, 106, p.125.

¹¹² Internet, UNHCR://Zambia.htm2001.

¹¹³ Zambia Daily Mail, supra note 110.

- **“Angola, UNITA sign ceasefire agreement”¹¹⁴**
- **“Angola moves closer to peace”¹¹⁵**
- **“Peace in Angola is irreversible-UNHCR”¹¹⁶**

After 27 years of civil war, Angola may experience peace. The Angolan army signed a memorandum of understanding with the UNITA rebel movement, paving way for a formal ceasefire. Both sides came to the table freely and both sides seemed to hold the view that the agreement was not imposed on them and so real peace is said to be in sight. The agreement was signed in the presence of representatives of the United Nations, United States of America, Russia and the former colonial power Portugal. Detailed plans were even worked out for demobilizing 50,000 UNITA soldiers in preparation for their integration into the army.¹¹⁷ Indeed, “the peace process in Angola seems to be irreversible”.¹¹⁸ Although the repatriation process will start as soon as UNHCR ensures that the safety of the people is guaranteed there are still high hopes of repatriation. So far two million (2m) Angolans have been assisted by the international community and the number is expected to rise to three million (3m). UNHCR expects 80,000 Angolan refugees to go back spontaneously. 260,000 refugees at Nangweshi refugee camp said they wanted to go back home.¹¹⁹ This will improve the situation in the camp and it will also reduce the burden that has been placed on the Zambian government, UNHCR and its partners.

4.1.2 Congolese Refugees

Since its independence in 1960, the Democratic Republic of Congo (former Zaire) has experienced continuous series of wars.¹²⁰

The ethnic groups in Congo DR that have been mostly fleeing the country are the Kasais and Balubas who originate from Lubumbashi and Likhasi. The reasons for

¹¹⁴ Sunday Mail, March 31, 2002.

¹¹⁵ Post Newspaper, No.1993, Monday April 1, 2002.

¹¹⁶ Ibid, No.2070, Monday June 17, 2002.

¹¹⁷ Post Newspaper, supra note 115.

¹¹⁸ Post Newspaper, supra note 116.

¹¹⁹ Ibid.

¹²⁰ Sakala, Mabvuto, supra note 100.

flight are centered mainly on military violence. People have fled the country as a result of the threat of violent death and serious injury from military agents and because of the actual experience or threat of severe physical abuse from Shaba province for reasons of Kasi ethnicity. In addition, there are a large number of Congolese who fled due to fear of governmental persecution based on actual or imputed political activities.¹²¹ The civil war in Congo DR began in 1998 when MLC and RCD tried to topple the government of the late Laurent Kabila. MCL led by Ugandan – backed Jean-Pierre Bemba has been fighting the government for almost 4 years. This war drew in the armies of Angola, Namibia and Zimbabwe on the side of the late President Kabila, while Uganda and Rwanda has been backing different rebel groups. The city of Kisangani has been the scene of fierce fighting since the civil war began.¹²² Facts that the conflicts were still going on until recently are evident from the following news headlines:

- **“DR Congo peace deal unraveling”**¹²³
- **“Kagame rejects DRC withdrawal”**¹²⁴

After the late President Laurent Kabila was killed, his son took over as President and peace hopes were revived in January 2001.¹²⁵ A ceasefire was agreed on last year, but has repeatedly been broken. Power-sharing proposals were made under which President Joseph Kabila from the PPRD ruling party would stay in office but rule as part of a cross-party council. This would entail that all parties would have an equal share of power within the interim administration. President Kabila would share power with Jean-Pierre Bemba a leader of MLC. One of the rebel groups-Congolese Rally for Democracy (RCD), which is backed by the Rwandan government, rejected the power-sharing proposals saying that the plan is not practical and that it would not produce lasting peace in the country. On the other hand, the Congolese Liberation Movement (MLC) said it was ready to share power with President Kabila.¹²⁶

¹²¹ UNHCR, 2002 Global Appeal, supra note, 106. p.125.

¹²² Post Newspaper, No.2004, Friday, April 12, 2002.

¹²³ Ibid. No. 2088. Friday, July 5, 2002.

¹²⁴ Ibid. No.2095. Friday, July 12, 2002.

¹²⁵ Post Newspaper, supra note, 122.

¹²⁶ Ibid.

Consequently, there was a build-up of Rwandan troops against the leader of MLC- Jean-Pierre Bemba, putting the peace deal under threat. Rwandan President Paul Kagame has rejected calls to withdraw Rwandan troops from the neighbouring DRC. This was followed by the withdrawal of the civil society groups from the peace talks.¹²⁷ Thus, the deal that was intended to end the 4 year long Congolese war seemed to be unraveling. Even after being taken to the International Court of Justice, the Rwandan President Kagame said that Rwandan troops would remain in the DRC until Rwanda's security concerns were met. The case against Rwanda has been brought under the International Convention on the Prevention and Punishment of the Crime of Genocide and Other Conventions relating to the rights of women, racial discrimination and torture. In the suit, Congo DR states that Rwandan troops invaded the country in August 1998 and occupied parts of eastern Congo including the town of Goma.¹²⁸ The charge is: "Killing, massacring, raping, throat-slitting and crucifying, Rwanda has rendered itself guilty of genocide of more than 3.5 million Congolese people."¹²⁹ Thus war seemed to be a permanent condition in Congo DR until recently when the country finally signed peace deals with Rwanda¹³⁰ and Uganda¹³¹.

Some Congolese who flee their country do not prefer resorting to Zambia as a place of asylum because; Congolese asylum seekers are sometimes forcibly returned to Congo DR by Zambian authorities acting in conjunction with Congolese counterparts. Nonetheless, Congolese people flee from their country to Zambia in large numbers.¹³²

Statistics indicate that by the end of June 2001, UNHCR was assisting approximately 44,000 Congolese refugees in Zambia. Most of these are settled in Mwange and Kala camps in Northern and Luapula provinces. There is hope of repatriation taking place now that peace agreements have been signed this year. In fact it has been reported

¹²⁷ Post Newspaper, *supra* note, 122.

¹²⁸ Post Newspaper, *supra* note, 128.

¹²⁹ *Ibid*.

¹³⁰ The Post Newspaper, **DRC, Rwanda sign peace deal**, No. 2114 July 31, 2002.

¹³¹ Radio Christian Voice. 10:00 hours news. September 6, 2002.

¹³² UNHCR, **2002 Global Appeal**, *supra* note, 106,p.127.

that refugees are voluntarily going back now that situations have improved especially in the Tutsis' home area.¹³³ The anticipated influx of some 6,000 new refugees¹³⁴ by the end of this year from Congo DR will most likely not be a reality now.

4.1.3 Urban Refugees

Urban refugees are those that have settled in urban areas, and most of them live in Lusaka. UNHCR was, by the end of 2001 assisting as many as 14,000 urban refugees. Out of this number 654 are Angolans, 10,248 Congolese, 627 Burundian, 1,795 Rwandan and 1,044 from other countries of origin.¹³⁵

4.2. UNHCR in Zambia

The following are the main objectives of UNHCR Zambia.

1. To provide protection and material assistance to refugees from Angola, Burundi, the Democratic Republic of Congo and Rwanda. UNHCR assists about 150,000 of these refugees in Zambia.
2. To seek long lasting solutions for refugees, among them, naturalization, repatriation whenever it is feasible and resettlement where appropriate.
3. To maintain a high level of emergency preparedness to readily assist new refugees.
4. To enhance programme implementation, service delivery and monitoring through training in all sectors, with particular emphasis on operational security, administration and management, as well as emergency preparedness and response mechanisms.
5. To continue with the provision of systematic support to the Zambian authorities in maintaining the civilian and humanitarian character of the refugee camps.
6. To provide some assistance to communities that host refugees with the aim of promoting local integration while at the same time playing a central role in sensitizing donors to assist these communities.

¹³³ Radio Christian Voice, supra note, 131.

¹³⁴ Internet, supra note, 112.

The above listed objectives are the general ones, but in addition to these, each office has its own objectives. For instance, the main objectives of the office for Angolan refugees in Zambia are: that the Angolan refugees are afforded protection and security in conformity with international refugee laws; to provide sufficient humanitarian assistance to new refugees; and to promote local settlement for refugees who wish to stay for a long time.¹³⁶ These objectives can only be achieved through the continued commitment of UNHCR. The organization must continue to provide protection, care and maintenance to the Angolan refugees. This has to be done in close co-operation with the government and implementation partners. UNHCR also has to ensure continued dialogue with the Zambian government concerning the implementation of strategies that will help integrate long-staying refugees in particular communities; enhance income-generating activities and strengthen awareness and preventive education campaigns. UNHCR Zambia strives to involve women in food management, education training and income generating activities.

With regard to Angolan refugee children, UNHCR will continue to focus on supporting the pre-school initiatives, universal access to primary education and higher education, that is above primary level, using the Zambian curriculum.¹³⁷ The important issues that UNHCR will continue to tackle in relation to refugee adolescents are those centered around reproductive health, sexually transmitted diseases/HIV AIDS and traditional attitudes towards sexual and gender violence.¹³⁸ Great attention will continue to be given to “community based programmes aimed at engaging adolescents in meaningful activities, such as vocational skills training, literacy and language training and micro-projects.”¹³⁹

UNHCR’s objectives for the Congolese refugees are: to receive and settle new arrivals; to provide protection and security for refugees in camps; to improve the

¹³⁵ **2002 Global Appeal**, supra note, 106, p.127.

¹³⁶ Ibid, p.125.

¹³⁷ Ibid.

¹³⁷ Ibid, p.126.

¹³⁸ Ibid.

quality of assistance and access to primary education; to promote self-reliance and social integration of vulnerable groups such as women, children and the youth; and to facilitate and assist the voluntary repatriation of refugees whenever it is possible.¹⁴⁰

These objectives will be achieved by UNHCR's strengthened implementation and monitoring of refugee protection. Further, there is need to continue encouraging refugees to fully participate in their communities and to assist in improving the already limited agricultural production.¹⁴¹

UNHCR's main objective for urban refugees is simply protection. This emanates from the fact that urban refugees have been known to forge their identity cards. This makes it difficult to identify legitimate refugees and thus protect and assist them.¹⁴² UNHCR has pledged to ensure that the procedure for refugee status determination is promoted and improved. It further promises to strengthen the existing procedures or criteria for the identification of those refugees who are authorized or eligible to reside in urban areas.

UNHCR Zambia carries out environmental awareness, education and protection in the refugee camps through training. These awareness and training programmes cater for all refugees regardless of where they are from. Furthermore, the office aims at improving services for the disabled. Things such as physical rehabilitation, psychological assistance and the active promotion of social integration will be looked into and promoted. "The disabled will continue to benefit as much as unimpaired people from micro-projects and other community activities."¹⁴³ The office will also continue to identify and provide relevant and necessary assistance to the elderly within the refugee communities. The organization will also encourage the refugee communities to promote social inclusion for the elderly refugees.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid, p.127.

¹⁴³ Ibid, p.126.

4.3 CONSTRAINTS

The constraints that inhibit the work of UNHCR in Zambia are political, social and economical in nature. Politically, the refugee endemic does not seem to be abating because conflicts in certain nations are continuing. The unending conflicts in Angola and DRC have made it difficult for UNHCR to achieve repatriation in 2002. As the refugee influx continues in Zambia, the ability of UNHCR to meet the needs of refugees is greatly challenged. Further, Zambia's legislative framework in relation to refugees is not favourable enough to allow for efficient local integration. Another factor which has contributed to the constraints is that some refugees tend to be armed and so create political and security concerns. As a matter of fact, there have been claims in the past by Angolan authorities that some UNITA rebels were operating from Nangweshi Camp. It goes without saying that such events create tension and indeed there has been tension between Zambia and Angola in the past due to arrivals of ex-combatants on the Zambian borders. Consequently, UNHCR has been spending time, money and other resources to separate armed elements and reinforce security in the camps.¹⁴⁴ This is being done in co-ordination with the Zambian government and other relevant agencies.

The continued economic problems that Zambia is experiencing have also been a constraint on UNHCR's effectiveness. Local integration of refugees living in Lusaka especially has proven to be a great challenge for UNHCR. The already poor economy and the long-staying refugees are most likely to be affected by the results of the heavy rain in the previous rainy season. The heavy rains resulted in poor harvest, which in turn meant less food. Some refugees depend on agricultural harvest for their livelihood and so they will have to struggle to some extent for food. The economic situation has also resulted in reduction of resources that the government is able to allocate to refugee protection. These constraints create tensions between refugees and the government as well as the Zambian citizens. Thus, there has been a spread of negative perceptions of refugees. Consequently, "Zambia's asylum policy has

¹⁴⁴ Ibid, p.125.

become less sympathetic to asylum-seekers, particularly urban groups, making it harder for UNHCR to find durable solutions for them.”¹⁴⁵

The social constraints include issues such as the lack of participation by some refugees. Unlike Angolan refugees, Congolese refugees do not actively participate in the provision of services in their communities. This makes it hard for UNHCR to enhance self-sufficiency in the refugee communities. Secondly, among urban refugees, protection has been hampered due to forging or copying of Identity Cards. It thus becomes difficult to identify genuine refugees and offer protection.

Despite all these constraints, UNHCR tries by all means to fulfill its mandate of protecting refugees and seeking durable solutions to their problems. The organization works hard in ensuring the respect of refugees’ basic human rights, especially that no person should be returned involuntarily to a country where he or she has reason to fear persecution. In order to provide the above-mentioned protection, UNHCR staff work in all sorts of areas. These range from capital cities of particular countries to remote camps and border areas. Refugees in Zambia certainly find life a lot more bearable because of UNHCR’s presence and help.

This chapter has provided a case study of Zambia as a means of analyzing UNHCR’s effectiveness. An attempt to assess this effectiveness has been done by taking specific refugee groups into consideration, namely Angolan and Congolese refugees. Finally, an account of UNHCR’s activities and workings in Zambia has been given. The next chapter will contain the conclusion for this whole study and proposals made by author.

¹⁴⁵ UNHCR, **2001 Global Appeal**, supra note, 105, p.129.

CHAPTER FIVE

CONCLUSION AND PROPOSALS

5.1 SUMMARY

The term 'refugee', when used ordinarily has a broader and looser meaning. It signifies someone in flight, who seeks to escape conditions or personal circumstances found to be intolerable. In light of such a definition, the destination of flight is not relevant, but the flight is to freedom and safety. The reasons for flight may range from deprivation, grinding poverty, war, civil strife, natural disasters, earthquake, flood, and drought, to famine.

The definitions of the term under international law depart from the ordinary meaning of the word refugees. In international law a 'refugee' is a person who is forced to leave home for certain specified reasons and who, furthermore, is outside the country of his or her origin and does not have its protection. The definition of a 'refugee' in international law is of critical importance for it can mean the difference between life and death for an individual seeking asylum.¹⁴⁶

The purpose of defining the 'refugee' is *inter alia*, to create obligations and duties. It provides guidance on the extent and limits of States' powers, requiring certain positive actions or limiting specific measures that affect the status and treatment of refugees. Determining who a refugee is is also important for determining what the above obligations entail as well as determining the availability of solutions to the refugee problem. Failure to determine who a refugee is results in failure to determine appropriate responses and solutions to the refugee problem.

In this study the refugee definition has been discussed as it is considered internationally, regionally and by the UNHCR. It has been established by looking at these definitions that the main reasons for flight are violations of human rights and threats to human

¹⁴⁶ Chimni, B.S, (ed), **International Refugee Law. A Reader**. Raoul Wallenberg Institute. 2002. p.81.

security. When an individual's government cannot avail protection for such violations and threats, a need arises to seek protection elsewhere. This protection is referred to as international protection.

It has further been established that a person in the above-mentioned circumstances has a right to seek and attain asylum. This is a fundamental right as well as a basic human right. It is the cornerstone of international refugee protection. This right is provided for in the Universal Declaration of Human Rights of 1948. Nonetheless, in international law, this right only means the right for a State to grant asylum, it does not entail a corresponding right of an individual to be granted asylum.

On the regional level the situation is somewhat different. The 1969 OAU Convention provides for asylum in Article II. According to this Convention, Member States of the OAU should use their best endeavours in line with their respective legislations to receive refugees and to secure their settlement.¹⁴⁷ It further provides that the grant of asylum to refugees is a peaceful and humanitarian act and shall not be regarded as an unfriendly act by any Member State.¹⁴⁸

The right to seek and attain asylum has been affected by the HIV/AIDS pandemic. Although UNHCR opposes the mandatory HIV testing of refugees, some countries do not follow UNHCR's view. Canada on the other hand is a country that aims at adhering to its obligations under the 1951 Refugee Convention and so refugees in the country are not discriminated against on the grounds of their medical status.

The principle of non-refoulement plays an important role in complementing the right to seek and attain asylum from persecution. It is a principle that is at the very core of refugee protection because it plays an important role in protecting people whose right to remain at home has been violated. This principle basically demands that refugees should not be forced to return to places where their lives or freedom would be threatened.

¹⁴⁷ Article II(1).

¹⁴⁸ Article II(2).

It has also been pointed out in this study that refugees have rights that are based on international standards. These include rights such as the right to earn and spend money; the right to health care; the right to education for refugee children; the right to work and earn money for adult refugees and the right to food and water for all refugees.

International protection requires certain participants. When national governments and state institutions who are key participants in guaranteeing protection, fail to protect their citizens, then international protection is invoked. The UNHCR is an organization which has been given two main functions, that of protecting refugees and promoting durable solutions to their problems. Ultimately the most important duty of UNHCR is international protection. It has been pointed out in earlier chapters that the protection of refugees remains UNHCR's *raison d'être*.

In an effort to assess UNHCR's effectiveness, a case study of Zambia has been done in this study. It has been established that due to Zambia's stable political environment and favourable refugee policies, many people have fled into its borders from neighbouring countries. The Angolan, and Congolese refugees are the most prevalent in Zambia. In addition to these there are also refugees from other countries such as Burundi and Rwanda. UNCHR has been providing protection and material assistance to these refugees. The organization has also been conducting awareness and training programmes. One of the organisation's most critical aims is to seek long lasting solutions for refugees.

The organization is putting in tremendous effort in fulfilling its mandate and achieving its aims, but it is faced with constraints. These constraints, it has been pointed out, are political, social and economical in nature. The constraints have inhibited the work of UNHCR and have led to negative attitudes towards refugees in the country. Nonetheless, UNHCR tries by all means to fulfill its mandate of protecting refugees and seeking durable solutions to their problems.

5.2 PROPOSALS

5.2.1 Reconsideration of the refugee definition

The 1951 Convention refugee definition should be reconsidered despite its international recognition. The 1951 Convention definition should be brought in line with the OAU Convention definition and the Cartagena Declaration definition. The 1951 Convention derived definition fails to reflect the full range of phenomena that give rise to involuntary migration, particularly in the less developed world. Further, its minimal protection against refoulement works a destructive injustice against many genuine refugees. Most Third World refugees find themselves turned away by Western States or offered something less than durable protection. Thus, its Cold War origins and Eurocentric focus cannot be entirely avoided.

The main reason for advancing broader refugee definitions was because the internationally accepted definition was not adequate to deal with the problems posed by the millions of externally displaced persons in the Third World. These broader definitions are only contained in the Third world instruments relating to refugees and therefore only apply to Third World member States and not to the international community. This means that the original problem has not completely been dealt with.

5.2.2 Peace Efforts

The attainment of peace in all the war torn countries and the prevention of conditions that impel people to flee would improve the refugee situation in the world. Political initiatives to address causes, obtain peace agreements and negotiate solutions are necessary and must be encouraged.

More leaders all the world over must therefore get involved in peace processes such as those that have been going on in case of Angola, Congo DR and Rwanda. These peace talks were initially facilitated by the former President of Zambia, Dr. F.T. J Chiluba and finally the facilitation by South African President, Thabo Mbeki has led to the signing of peace agreements between DR Congo and Rwanda as well as Congo DR and Uganda.

There should be ardent insistence within the international and regional community that nations ensure that the human rights of their citizens are protected so that people do not have to seek protection outside their own countries.

The attainment of international peace and security is highly dependent on the ability of sovereign states to carry out their domestic duty of safeguarding human rights. This is a critical starting point to solving the refugee problem.

5.2.3 More efficient and meaningful participation by international organizations and donor communities

Key to the protection of refugees is the provision of the basic and fundamental amenities. These include food, reasonable shelter, and access to education and health facilities. Without these, there can be no meaningful protection of refugees. The failure of a host country to provide basic and fundamental amenities can lead to a situation where refugees are forced to return to their home countries, where, although torn with conflicts, basic amenities are attainable.

In many cases, countries that host refugees, in Africa especially, are already facing situations of over population, poor economy and lack of basic facilities for their citizens. The presence of refugees therefore places a greater burden on the economies of these host countries. This calls for a need for new approaches to finding solutions to the refugee problem.

Zambia's open door asylum policy to victims of war and persecution for instance has had a negative impact on the security, economic, social sectors and environment of the country. There is need for the donor community to reciprocate the good will that countries like Zambia have exhibited in hosting refugees. It is acknowledged that without the humanitarian assistance from the international community, Zambia would have had a serious crisis on its hands in view of the limited resources that are available. But even in light of this assistance, there is still need for more.

5.2.4 New approach to the refugee problem

The many people that find themselves in refugee situations should not be encouraged to be wholly dependent on their host countries, UNHCR or other organizations for their livelihood. There is need for the donor community to participate in harnessing the productive capacity of refugees (especially those who have settled in urban areas), to ensure that they become productive members of the community.

It is important for UNHCR to continue with the discussions on income generating activities that it has been with the Zambian government. Once refugees get involved in income-generating activities, the pressure that the masses of refugees has exerted on the Zambian economy and the already limited resources will perhaps reduce.

The protection of refugees in a country like Zambia, with limited resources and a poor economy could be affected if the citizens began to look at refugees as an unnecessary burden on the country. If many or the majority of Zambians were to develop a negative attitude towards refugees, it would become more challenging for UNHCR to provide the necessary protection for the refugees in Zambia.

Efforts to reduce the development of hostile attitudes towards refugees among citizens of host countries should be made by all means.

The definitions of a refugee that have been looked at in this study imply both the lack of protection by a person's State of origin and the need for alternative protection. Although people fleeing persecution have a right to seek and attain asylum, there is no absolute obligation for other States to grant this asylum. There are no specific provisions in the 1951 Convention defining which particular State has the obligation of providing alternative protection. States still find themselves providing this alternative protection whose general principles have become an integral part of customary international law.

Today, countries of origin are being called upon to eradicate the causes of flight and to facilitate return. This is in line with the growing tendency for the international community to concern itself with conditions that until recently would have been treated as internal matters. These are violations of human rights, repression of minorities, indiscriminate violence and persecution. More and more efforts are being made to bring refugee-producing countries to a place where there can be international cooperation aimed at preventing, stopping and reversing the conditions that cause people to flee.

Perhaps if many States in the world took up the responsibilities mentioned above there would be a drastic fall in the number of refugees in the world.

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